Supreme Court, U.S.
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No. 02-1574

In The

Supreme Court of the United States

THE UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL A. NEWDOW, ET AL.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF WALLBUILDERS, INC.

in support of the *Petitioner*

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INTEREST OF *AMICUS CURIAE*[1]

WallBuilders, Inc. is a 501(c)(3) organization that is dedicated to the restoration of the moral and religious foundation on which America was built. As such, the organization has a direct interest in seeing that students are allowed to say the full and official version of the Pledge of Allegiance in their schools. WallBuilders has a large base of supporters who are equally concerned with this issue.

This brief is filed pursuant to the consent of the counsel of record for all parties.

SUMMARY OF THE ARGUMENT

The Ninth Circuit Court of Appeals erred in ruling that the Elk Grove Unified School District's policy of having elementary aged school children recite the Pledge of Allegiance is unconstitutional. In ruling the Pledge unconstitutional, the Ninth Circuit overlooked this Court's *dicta* concerning the constitutionality of the Pledge. This brief will document in greater detail the assertion of the United States and Elk Grove Unified School District that the Ninth Circuit should have been guided by this Court's *dicta*. This brief will show certain types of *dicta* should be viewed as having binding

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[1] No counsel for any party has authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the amicus curiae, its members, and its counsel.

authority or nearly so. The Ninth Circuit has itself decided that this Court's *dicta* is on the upper end of the precedential continuum. The Ninth Circuit should have been guided by this Court's *dicta* and ruled the policy of the school district constitutionally sound.

ARGUMENT

In their briefs, both the United States and Elk Grove Unified School District have mentioned this Court's *dicta* regarding the constitutionality of the Pledge of Allegiance. (Appellant United States' Petition for Writ of *Certiorari* at 19-20).; (Appellant School District's Petition for Writ of *Certiorari* at 6). The purpose of this brief is to expand upon reasons why the United States and Elk Grove Unified School District were correct in their assertions that the Ninth Circuit should have been guided by this Court's Pledge *dicta.*

I. THE NINTH CIRCUIT'S OPINION SHOULD BE REVERSED BECAUSE IT ERRED BY NOT GIVING DEFERENCE TO THE *DICTA* OF THIS COURT WHICH HAS STATED THAT THE PLEDGE OF ALLEGIANCE IS CONSTITUTIONAL.

The debate between the majority and minority opinions as well as Judge O'Scannlain's dissent

from denial of rehearing is over whether to decide the issue of the constitutionality of the Pledge of Allegiance by trying to extend the logic of this Court's Establishment Clause precedent or by using this Court's *dicta* regarding the Pledge of Allegiance. *Newdow v. United States Congress*, 328 F.3d 466, 471-82 (9th Cir. 2003) (O'Scannlain, J., dissenting from denial of rehearing *en banc*); *id.* at 482-90 (majority opinion); *id.* at 490-93 (minority opinion).

The problem with trying to apply the precedent in a new context is that this Court's Establishment Clause jurisprudence has often been unpredictable, as various Justices of this Court have acknowledged. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 107-12 (1985) (Rehnquist, J., dissenting) (stating that the application of the Establishment Clause since the late 1940s has little value because it has no basis in history and "is difficult to apply and yields unprincipled results."). With this type of unpredictable Establishment Clause jurisprudence, this Court should affirm the approach of the dissent below as well as the Seventh Circuit's decision in *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 439 (7th Cir. 1992). Following this Court's *dicta* would have been the best alternative for the Ninth Circuit. "[A]n inferior court had best respect what the majority [of the United States Supreme Court] says rather than read between the lines. If the Court proclaims that a practice is consistent with the establishment clause, we take its assurances

seriously. If the Justices are just pulling our leg, let them say so." *Id.* at 448.

Below, the majority opinion recognized that this Court has stated in *dicta* that the words "one nation under God" in the Pledge of Allegiance are constitutional." *Newdow,* 328 F.3d at 489. However, the majority did not give deference to this Court's *dicta*, as it stated it would. *Id.* The question for this Court to resolve is whether the Ninth Circuit gave inadequate deference to this Court's *dicta*. For the reasons stated in the discussion below, the Ninth Circuit should have been guided, if not bound, by this Court's *dicta* regarding the constitutionality of the Pledge.

Dictum is "[a]n opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of adjudication . . . ." Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 Chi.-Kent L. Rev. 655, 710 (1999). Judges and attorneys often divide *dicta* into *obiter dicta* and judicial *dicta* to determine the precedential value of individual *dictum*. *Id.* at 712-13. *Obiter*, or mere, *dicta* is an opinion expressed in passing and has less persuasive value. *Id.* at 713. Judicial *dicta* are "court's reasoned consideration and elaboration upon a legal norm" and have much more persuasive authority. *Id.* at 713-14.

In fact some courts, including this Court, give judicial *dicta* great weight. In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), this Court adhered to

judicial *dicta* which was regarded as a "well-established rationale upon which the Court based the results of its earlier decisions." *Id.* at 67. Similarly, this Court has stated that the "principle *of stare decisis* directs us to adhere not only to the holdings of . . . prior cases, *but also* to . . . explications of the governing rules of law." *County of Allegheny v. ACLU,,* 492 U.S. 573, 668 (1989) (emphasis added).

Likewise, the Third Circuit Court of appeals has noted that "[a] . . . distinction has been drawn between 'judicial *dictum'* and '*obiter dictum'*: Judicial *dicta* are conclusions that have been briefed, argued, and given full consideration even though admittedly unnecessary to decision. A judicial *dictum* may have great weight." *Cerro Metal Products v. Marshall*, 620 F.2d 964, 978 n.39 (3d Cir. 1980). Indeed, judicial *dicta* are of such serious consequence that some courts consider judicial *dicta* issued by supreme courts to be binding precedent: "A Wisconsin court has stated it thus: 'When a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum but is a judicial act of the court which it will thereafter recognize as a binding decision.'" *Id.* (citation omitted).

Furthermore, the distinction between *obiter dictum* and *judicial dictum* is not a bright line.. Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 Chi.-Kent L.

Rev. 655, 717-18 (1999). Hard and fast divisions "are probably wrong" and can lead to "intellectual chicanery." *Id.* at 730, 776. It is not easy to determine what constitutes judicial *dictum*. *Id.* at 735. In fact, *dicta* are better thought of as being on a continuum. *Id.* at 740. Under this view, *obiter dicta*, in which a court has not deliberated over what it has said, *see id.*, rest at the lower end of the continuum. Judicial *dicta*, in which a court has more deliberately considered what it has said to guide future litigation and in which the parties may have briefed the issue, *id.* at 730, rest at the upper end of the continuum. Therefore, it is important under this view to realize that *dicta*, even *dicta* other than that which is *technically* judicial *dicta*, can lie very close to that end of the continuum and can be worthy of receiving precedential or near-precedential value.

Ironically, the Ninth Circuit itself has placed *dicta* issued by the United States Supreme Court on the upper end of the continuum. *See United States v. Baird*, 85 F.3d 450, 453 (9th Cir. 1996). According to the Ninth Circuit, Supreme Court *dicta* is to be treated "with due deference." *Id.* One Ninth Circuit judge has stated that Supreme Court *dicta* must not be discarded lightly. *Navajo Nation v. U.S. Dept. of Health and Human Services*, 285 F.3d 864, 877 (9th 2002) (Fletcher, J., dissenting). Another stated, "[D]icta of the Supreme Court have a weight that is greater than ordinary judicial dicta as prophecy of what the Court might hold. We should

not blandly shrug it off because they were not a holding." *Zal v. Steppe*, 968 F.2d 924, 935 (9th Cir. 1992) (Noonan, J., concurring in part and dissenting in part). The Ninth Circuit, therefore, has placed Supreme Court *dicta* high on the continuum giving it great weight – even when that the *dictum* is not judicial *dictum*. For example, this Court's *dicta* at issue in *Zal* must be considered obiter *dicta*, yet Judge Noonan pointed out the weight they deserved. *See id.*

Certainly, this Court's *dicta* regarding the Pledge of Allegiance are worthy of even more weight since they are much closer to the judicial *dicta* end of the continuum. While the constitutionality of the Pledge may not have been extensively briefed and argued, the pertinent Establishment Clause test and principles *were* briefed and argued in all the cases in which the Pledge was used as an illustration. For example, this Court has stated, "Our previous opinions have considered in *dicta* the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." *County of Allegheny v. ACLU*, 492 U.S. 573, 602-03 (1989). This Court also stated that one's "religiously based refusal" to recite the pledge should not interfere with the right of others to recite it. *See Newdow*, 328 F.3d at 492 (Fernandez, J., concurring in part and dissenting in part) (citing *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). In fact, five

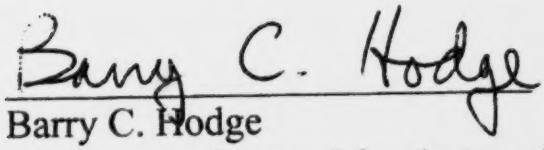
current Justices of this Court, as well as eight prior Justices, have recognized that including "under God" in the Pledge of Allegiance does not impose a danger to society by establishing a theocracy or inhibiting one's religious beliefs. *Id.* at 491 (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 602-03, 672-73 (1989); *Wallace v. Jaffree*, 472 U.S. 38, 78 n (1985); *Lynch v. Donnelly*, 465 U.S. 668, 676, 693, 716, (1984); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 306-08 (1963).

The majority opinion below dismissed this Court's *dicta* because this Court has never *directly* addressed the issue and has not applied the Establishment Clause tests to it. *Newdow*, 328 F.3d at 489. Based on the Ninth Circuit's own precedent, Supreme Court *dicta* should be given great deference. *Baird*, 85 F.3d at 453. This Court has stated multiple times that the pledge does not violate the Establishment Clause. *See Newdow*, 328 F.3d at 491 (Fernandez, J., concurring in part and dissenting in part) (noting cases cited in the previous paragraph). Because this Court has declared the Pledge to be constitutional on multiple occasions, and because each of the cases addressed basic First Amendment principles, this Court did not make those statements regarding the Pledge without due consideration. Therefore, the Ninth Circuit erred by not being guided by the applicable *dicta* from this Court. Had it been so guided, it would have upheld the constitutionality of the Pledge. Indeed, this Court has already decided the issue.

CONCLUSION

For the foregoing reasons, *amicus* respectfully request this Court to grant Petitioners' writ of certiorari.

Respectfully submitted
This 30th day of May 2003



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